

No. A05-0634

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Lisa L. Bradley, Trustee for the Sally G.
Moore and Robert A. Moore Revocable Living Trust,

Appellant,

v.

First National Bank of Walker, N.A.,

Respondent.

**BRIEF AND APPENDIX OF
RESPONDENT FIRST NATIONAL BANK OF WALKER, N.A.**

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STATEMENT OF ISSUES

- I. Does the Minnesota Commercial Code or the Minnesota Fiduciaries Act apply to the Plaintiff's claim for "notice of breach of fiduciary duty?"

The District Court held that the Minnesota Commercial Code applies.

Apposite Authority:

Minn. Stat. § 645.26 (2004)
Minn. Stat. § 336.3-118(g) (2004)
Minn. Stat. § 541.05 (2004)

- I(A). Is Plaintiff's "notice of breach of fiduciary duty" claim time barred pursuant to Minn. Stat. § 336.3-118(g)?

The District Court held that Plaintiff's notice of breach of fiduciary duty claim is time barred pursuant to Minn. Stat. § 336.3-118(g).

Apposite Authority:

Minn. Stat. § 336.3-118(g) (2004)

- II. Does the Minnesota Commercial Code displace Plaintiff's common law claims of negligence and breach of contract?

The District Court held that the Minnesota Commercial Code displaced Plaintiff's common law claims of negligence and breach of contract.

Apposite Authority:

Minn. Stat. § 336.3-307 (2004)
Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990)
Halla v. Norwest Bank Minnesota, N.A., 601 N.W.2d 449 (Minn. Ct. App. 1999)
Hedged Investment Partners v. Norwest Bank MN, 578 N.W.2d 765 (Minn. Ct. App. 1998)

III. Did Plaintiff have a meaningful opportunity to respond to Defendant's argument that Plaintiff's "notice of breach of fiduciary duty" claim is time barred pursuant to Minn. Stat. § 336.3-118(g)?

The District Court did not directly address this issue in its Order or Memorandum.

Apposite Authority:

Septran, Inc. v. Independent School Dist. No. 271, Bloomington, MN, 55 N.W.2d 915 (Minn. Ct. App. 1997)

Hebrink v. Farm Bureau Life Ins. Co., 664 N.W.2d 414 (Minn. Ct. App. 2003)

STATEMENT OF THE CASE

On July 25, 2003, Plaintiff sent the Summons and Complaint to First National's counsel via U.S. Mail. Appellant's Appendix ("A. App.") at 1-6. On July 31, 2003, First National acknowledged service of the Summons and Complaint pursuant to Minn. R. Civ. P. 4.05. Id. at 7.

On March 23, 2004, First National moved for summary judgment seeking a dismissal of all of Plaintiff's claims. Id. at 15-29. On January 12, 2005, the Cass County District Court, Judge David F. Harrington presiding, issued an Order and Memorandum granting First National's motion for summary judgment and dismissing all of Plaintiff's claims. Id. at 83-91.

On March 28, 2005, Plaintiff submitted a Notice of Appeal to Court of Appeals and Statement of Case of Appellant. Id. at 92-97. On April 4, 2005, a Certificate as to Transcript was issued. Respondent's Appendix ("R. App.") at 140-41. On May 6, 2005, the transcript was filed with the court administrator and delivered via U.S. Mail to counsel. Id. at 142. On June 9, 2005, Plaintiff served her Brief and Appendix.

STATEMENT OF FACTS

I. THE PARTIES.

A. First National.

First National is a national bank located in Walker, Minnesota.

B. Lisa Bradley.

In July 1984, Lisa Bradley (“Plaintiff”) was a bookkeeper at an accounting firm in Lake Havasu, Arizona. R. App. at 23. As a bookkeeper, she reconciled bank accounts, and prepared financial statements, sales tax returns, and tax returns. Id. at 23, 25.

In May 1986, Plaintiff purchased the accounting firm where she was employed. Id. at 25. The firm provides a full range of services, including fiduciary services, payroll services, investment services, bill paying services, accounts payable and accounts receivable services, tax preparation, and IRS audits. Id. at 26-27. Plaintiff also acts as a trustee. Id. at 26-27, 21.

Over the years, Plaintiff has acquired a number of certifications and licenses. She is an enrolled agent, a designation provided by the United States government that certifies her knowledge of all forms of taxation; she has a Series Six License, which permits her to provide investment services; and she has been certified as an Accredited Business Accountant and Accredited Tax Accountant by the Accredited Council of Accountants & Taxation. Id. at 24-28.

II. SALLY AND ROBERT MOORE ESTABLISHED A REVOCABLE TRUST.

A. The Trust.

In 1990, Sally and Robert Moore created a revocable trust (the “Trust”). Id. at 77-91. Sally and Robert were the trustors and original trustees. Id. at 77. Two of Robert’s relatives were the original successor trustees. Id.

B. The Trust Opened An Account At First National.

At the time the Trust was established, the Moores opened a checking account (“Trust Account”) at First National. Id. at 221, 223-24. Sally and Robert were the authorized signers on the Trust Account. Id. As authorized signers, the Moores were entitled to withdraw all or any part of the account balance, receive statements, and make inquiries as to the status of the Trust Account. Id. Sally and Robert could each make a withdrawal without the other’s approval or signature. Id.

C. First National’s Check Processing Is Fully Automated.

The Moores withdrew funds from the Trust Account by writing checks. The checks were processed for payment at First National. Id. at 229. This process is fully automated. Id. at 221, 229. The checks are run through an automated sorter, which processes the checks. Id. at 229. During the sorting process, a copy of each check is stored on film. Id. at 221, 229. The sorter then groups the checks according to the account on which the check is drawn. Id. at 229. The only manual aspects of the process are: (1) an employee takes the organized checks and places them in the account file where they are held until the checks are sent to the customer along with the monthly statement; and (2) if the check is a “large item check,”¹ an employee compares the signature on the check with those on the signature card to ensure the check was issued by an authorized signature. Id.

¹ A “large item check” is a check drawn for over a certain amount that is established by each individual bank.

III. ROBERT MOORE DIED AND SALLY MOORE AMENDED THE TRUST TO APPOINT PLAINTIFF AS THE SUCCESSOR TRUSTEE.

In 1993, Robert Moore died. Id. at 32. After his death, Sally Moore revoked the appointment of Robert's relatives as successor trustees. Id. at 92-93. Based on Sally's relationship with Plaintiff, who had prepared the Moores' tax returns for the six years prior to the amendment, Sally appointed Plaintiff as the sole successor trustee. Id. at 33, 92.

After Plaintiff's appointment as the successor trustee, she became an authorized signer on the Trust Account. Id. at 43, 115. As an authorized signer, Plaintiff was empowered to conduct transactions on behalf of the Trust. Id. at 115. Specifically, Plaintiff was authorized to withdraw all or any part of the account balance, receive statements, and inquire as to the status of the Trust Account. Id. at 115, 225-26. Plaintiff alone could make withdrawals – Sally Moore's signature was not required. Id.

IV. SALLY MOORE BECAME ILL AND APPOINTED GLENN SMITH AS A CO-SUCCESSOR TRUSTEE.

In May 1996, Sally Moore was diagnosed with cancer. Id. at 46. She informed Plaintiff that she was again amending the Trust. Id. at 3-6. The purpose of the amendment was to include the Immanuel Lutheran Church of Walker as a beneficiary. Id. Attorney Glenn Smith was to prepare the amendment. Id.

On July 1, 1996, Sally Moore was admitted to a hospital. Id. at 35. On September 13, 1996, Smith prepared and Sally Moore executed the Third Amendment to the Trust. Id. at 36, 95-104. In addition to adding the church as beneficiary, Smith was appointed a co-successor trustee. Id. at 102.

V. SALLY MOORE DIED AND PLAINTIFF AND SMITH BECAME CO-TRUSTEES.

A. Plaintiff And Smith Became Authorized Signers On The Trust Account.

Sally Moore died on September 28, 1996, making Plaintiff and Smith co-trustees of the Trust. Id. at 36, 102. Thereafter, Plaintiff and Smith executed a signature card and both became authorized signers on the Trust Account. Id. at 113. The signature card authorized Plaintiff and/or Smith to conduct transactions on behalf of the Trust. Id. They were each authorized to withdraw all or any part of the account balance, receive statements, and inquire as to the status of the Trust Account. Id. at 113, 227-28. Plaintiff and Smith were each authorized to make withdrawals. Id. Both signatures were not required. Id.

B. Plaintiff's Understanding Of Her Duties As A Trustee.

Plaintiff attended seminars and took continuing professional education classes that addressed trusts. Id. at 30. She also contacted attorneys in Lake Havasu, Arizona for advice when questions arose relating to trusts. Id. at 31. During her deposition, Plaintiff described her duties as a trustee as follows:

Q: What are the responsibilities of a trustee for a trust?

A: A trustee for the trust is mainly to protect the assets of the trust.

Q: Anything else?

A: To protect -- to make sure that the trust is carried out as it is written whatever that may be.

Q: Anything else?

A: Make any necessary distributions designated by the trust, any given date that trust may mandate.

Id.

C. The Trust Assets.

The Trust was comprised of the following assets:

- An investment account at A.G. Edwards that was valued at approximately \$350,000.00, Id. at 44, 46;
- A home and an office building in Arizona, Id. at 45;
- A home in Minnesota, Id. at 46;
- A boat in Minnesota, Id.;
- A checking accounting in Minnesota that held approximately \$6,000.00, Id.; and
- Miscellaneous household items. Id. at 52.

VI. PLAINTIFF CEDED HER RESPONSIBILITIES AS A TRUSTEE TO SMITH

The Trust does not permit the trustees to divide their responsibilities. Id. at 86. In spite of this, Plaintiff ceded to Smith complete responsibility for a number of duties:

Q: I'm saying did you believe that you had as much power as he did at all times?

A: Yes.

Q: And then you allowed him to exercise more power?

A: I don't know if you want to call it power. He did more the duties.

Q: You allowed him to do more the duties?

A: Yes.

Id. at 48.

Smith managed the assets located in Minnesota, which had a value of approximately \$94,500.00. Id. at 39, 47. In addition, he managed the Trust Account, investment property, and received all of the Trust's mail. Id. at 39-40. Plaintiff managed the \$208,000.00 in assets located in Arizona. Id. at 47. Plaintiff forwarded all income from the Arizona assets to Smith when she received them. Id. at 38, 49-50.

Plaintiff was to prepare the Trust's tax returns: "I assumed that being the tax preparer I would be preparing the tax returns." Id. at 54. Yet, on March 10, 1997, she asked Smith whether he would be preparing the tax returns. Id. at 53, 117. She did not receive a response, so on March 27, 1997, she again sent a letter to Smith placing him on notice that a tax return had to be filed. Id. at 119. Although Plaintiff had assumed she would be preparing the tax returns, Smith informed her that he would file for an extension. Id. at 121.

Because an extension requires no financial information, Plaintiff could have filed for the extension herself. Id. at 55-56. Nonetheless, she assumed Smith would file for an extension. Id. at 55. In fact, a request for an extension was not filed. Id. at 59. Moreover, a tax return for that year was never filed. Id. at 41-42.

One year later, in April 1998, Plaintiff still had not been provided with any of the Trust's financial documents and was again unable to file a tax return, so she expressed concern about the Trust in a letter to Smith:

Q: In the last paragraph you say, "I'm a little concerned about the Sally Moore trust." As of April 22, '98 you were a little concerned?

A: Yes.

Q: It says, “We missed some tax filing deadlines.” What tax filing deadlines are we referring to?

A: At that point we had missed two years of filing taxes.

Id. at 58, 123. In this same letter, Plaintiff requested that Smith “box up Sally’s information and ship it out to me.” Id. at 123.

Plaintiff did not receive a response to her letter. Id. at 60-61. She waited until June 2 – almost two months later – to call Smith. Id. at 61, 125. Because she could not reach Smith, she left a message. Id. Smith returned the message almost two weeks later with a message stating he would provide the materials in two weeks. Id. at 62, 127. Plaintiff did not receive the materials in two weeks. Id. at 63. Yet, she waited until September to contact Smith at which time she was informed that Smith’s phone was disconnected. Id. at 63.

VII. PLAINTIFF BEGAN TO INVESTIGATE THE DISPOSITION OF THE TRUST ASSETS.

A. In October 1998, Plaintiff Contacted The Beneficiaries For The First Time.

At the end of October 1998, Plaintiff sent letters to the beneficiaries of the Trust asking whether they had received distributions. Id. at 64-65, 129-30, 132. The beneficiaries informed Plaintiff that they had not received any distributions. Id. at 64, 131, 134.

B. In November 1998, Plaintiff Contacted First National For The First Time.

Plaintiff acknowledged that she could have contacted First National and asked for information concerning the Trust Account at any time after October of 1996 – when she and Smith became authorized signers on the Trust Account:

Q: So after October of '96 if you wanted information you could have called the bank directly; right?

A: Yes.

Q: Because you were co-signatory on the account; right?

A: Yes.

Id. at 51.

In November 1998, Plaintiff called First National for the first time. Id. at 66. She spoke to a bookkeeper in the accounting department. Id. at 66, 229. The bookkeeper answered all of Plaintiff's questions about the account. Id. at 67. Plaintiff found out that the account had been depleted. Id.

C. Plaintiff Received The Trust's Financial Records Two Years After She Began Requesting Them.

On December 4, 1998, Smith began sending Plaintiff financial documents for the first time since they became co-trustees. Id. at 72, 138. By January 1999, Plaintiff realized that Smith had stolen the funds and that it was highly unlikely that he would be able to pay them back. Id. at 74-75.

VIII. SMITH PLEAD GUILTY ON JULY 13, 2000.

On October 9, 1999, Smith was indicted in federal court on charges of mail fraud and engaging in monetary transactions in criminally-derived property. On July 13, 2000,

he pled guilty to all the charges and was sentenced. Id. at 75, A. App. at 4. He was ordered to pay \$530,000 in restitution to the trust. A. App. at 4. Smith has paid approximately \$61,750 and the Minnesota client security fund has paid an additional \$100,000. Id. This leaves \$368,250 unpaid. Id.

IX. PLAINTIFF COMMENCED THIS CASE ON JULY 31, 2003.

On July 25, 2003, Plaintiff sent the Summons and Complaint to First National's counsel via U.S. Mail. A. App. at 1-6. In the Complaint, Plaintiff attempts to recover the remaining \$368,250 that Smith embezzled. Plaintiff asserted claims for (a) notice of breach of fiduciary duty under the Minnesota Fiduciaries Act, (b) negligence, and (c) breach of contract. Id. First National filed an Answer denying liability. Id. at 8-12.

STANDARD OF REVIEW

On appeal of summary judgment, it is the function of the appellate court to determine whether genuine issues of material fact exist and whether the district court erred in its application of the law. Hunt v. IBM Mid American Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). Summary judgment is proper when the non-moving party fails to provide specific facts indicating there is a genuine issue of fact. Erickson v. General United Life Ins. Co., 256 N.W.2d 255, 258-59 (Minn. 1977). To successfully oppose a motion for summary judgment, a party cannot rely on mere general statements of fact but rather must demonstrate at the time the motion is made that specific facts exist that create a genuine issue for trial. Hunt, 384 N.W.2d at 855; Erickson, 256 N.W.2d at 258-59.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT THE MINNESOTA COMMERCIAL CODE APPLIES TO PLAINTIFF'S NOTICE OF BREACH OF FIDUCIARY DUTY CLAIM.

The Minnesota Commercial Code ("Code") addresses a bank's obligations when dealing with trustees and trust funds. Minn. Stat. § 336.3-307 (2004) (entitled "Notice of Breach of Fiduciary Duty"). The Minnesota Fiduciaries Act ("Act") also addresses a bank's obligations when dealing with trustees and trust funds. Minn. Stat. § 520.08 (2004) (entitled "Deposit in Name of Principal"). Both the Act and the Code set forth the circumstances under which a bank may be liable for a trustee's misuse of trust funds. The District Court properly held that the Code, rather than the Act, applies to Plaintiff's notice of breach of fiduciary duty claim. A. App. at 90.

A. Because The Code And The Act's Statutes Of Limitation Conflict, And Because The Code Was The Most Recently Enacted And Amended Statute, The Code Applies To The Notice Of Breach Of Fiduciary Claim.

Section 645.26 of the Minnesota Statutes sets forth rules of statutory construction. It provides that when two statutes conflict, the more recent statute controls. Minn. Stat. § 645.26(4) (2004). The Minnesota Supreme Court has held that two statutes conflict when their application leads to divergent outcomes. Correll, D.D.S. v. Distinctive Dental Servs. P.A., 607 N.W.2d 440, 441 (Minn. 2000); Schultz v. Ruiz, 161 N.W.2d 537, 540 (Minn. 1968).

1. **The Code And The Act Both Establish When A Bank May Be Liable For The Acts Of A Fiduciary Who Breaches His Fiduciary Duty.**

As set forth above, the Code and the Act both address a bank's obligations when dealing with trustees and trust funds. They provide that a bank does not have notice of a trustee's breach of fiduciary duty (and is not liable) simply because an instrument is issued by the fiduciary to himself personally. Minn. Stat. § 336.3-307(b)(3) (2004) (the Code); Minn. Stat. § 520.08 (2004) (the Act). Both statutes have exceptions that are based upon a bank's knowledge at the time the checks are honored. For example, the Code provides that a bank does not have notice of a breach of fiduciary duty "unless the taker knows about the breach of fiduciary duty." Minn. Stat. § 336.3-307(b)(3) (emphasis added). The taker "knows" of a breach of fiduciary duty "when he has actual knowledge of it." Minn. Stat. § 336.1-201(25) (2004). The Act provides that a bank is not liable unless the bank acts "with actual knowledge that the fiduciary is committing a breach of an obligation as a fiduciary . . . or with knowledge of such facts that its action . . . amounts to bad faith." Minn. Stat. § 520.08.

2. **A Notice Of Breach Of Fiduciary Duty Claim Is Subject To A Three-Year Statute Of Limitation Under The Code And A Six-Year Statute Of Limitation Under The Act.**

Although the Code and the Act both address liability for handling an instrument with notice of a breach of fiduciary duty, they are subject to different statutes of limitation. The Code provides that a party has three years after the cause of action accrues to assert a claim. Minn. Stat. § 336.3-118(g) (2004). The Act does not set forth a

limitation period. Thus, a claim under the Act is subject to the general six-year statute of limitation. Minn. Stat. § 541.05 (2004).

3. **The Code And Act's Statutes Of Limitation Conflict, And The Code's Three-Year Statute Controls.**

The Act's six-year statute of limitation conflicts with the Code's three-year statute. Application of the two limitation periods lead to divergent outcomes. As the District Court found, the Code's three-year statute bars Plaintiff's claim. On the other hand, the Act's six-year statute may not bar Plaintiff's claim in its entirety. Indeed, Plaintiff would not be arguing for application of the six-year statute if it did not result in a different outcome.

Because the two limitation periods conflict, the District Court properly turned to Minn. Stat. § 645.26. Section 645.26 compels a court to apply the most recently enacted statute. Minn. Stat. § 645.26(4). As the Court noted, the Code was originally enacted in 1965 and amended in 1992. The Act was originally enacted in 1945 and amended in 1986. Thus, the District Court properly found that the Code was the more recent statute and, therefore, controls.²

B. Plaintiff's Arguments Must Fail.

Plaintiff asserts the District Court erred because (1) the Code did not repeal the Act in its entirety, (2) the Code only applies to a "taker" and not a "payor bank," (3) in McCartney v. Richfield Bank & Trust Co., 2001 WL 436154 (Minn. Ct. App.

² Plaintiff argues that the Code and Act do not conflict. Plaintiff does not, however, address which statute controls in the event they do conflict. In other words, Plaintiff appears to concede that if the statutes conflict, the Code controls.

May 1, 2001) the Court applied the Act, and (4) two cases from other jurisdictions support the argument that the Code and Act do not conflict. The District Court properly rejected these arguments.

1. The District Court Did Not Hold That The Code Repealed The Act In Its Entirety.

First, Plaintiff asserts that the District Court erred because the Code did not repeal the Act in its entirety. However, the District Court did not hold that the Code repealed the Act in its entirety. The District Court held that the Code's three-year statute of limitation and the Act's six-year statute of limitation conflict and that the Code controls.

A. App. at 90. Plaintiff's "straw man" argument must be rejected.

2. The Code's Definition Of "Taker" Includes A "Payor Bank" Such As First National.

Plaintiff contends that the Code does not apply in this case because Minn. Stat. § 336.3-307 applies only to a "taker" and not a "payor bank"³ such as First National. Plaintiff's argument is without merit.

Section 336.3-307 addresses situations in which a fiduciary embezzles money from the represented person by applying proceeds of an instrument that belongs to the represented person to the personal use of the fiduciary. Comment 2 to section 336.3-307 explicitly provides that it applies to a payor bank like First National:

The section also covers a transaction in which an instrument is presented for payment to a payor bank that pays the instruments by giving value to the fiduciary.

³ A "payor bank" "means a bank that is the drawee of a draft." Minn. Stat. § 336.4-105 (2004). A "drawee" "means a person ordered in a draft to make payment." Minn. Stat. § 336.3-103(a)(2) (2004).

Id. (emphasis added); see also Hawkland and Lawrence UCC Series § 3-307:3 (Rev. Art. 3) (“Section 3-307 also determines when a payor bank pays an instrument with notice of breach of fiduciary duty.”) (emphasis added).

First National held the account on which the checks were drawn. As Plaintiff recognizes, this makes First National a payor bank. Because Code section 336.3-307 applies to a payor bank, the District Court correctly held that the Code applies to First National.

3. **The Cases Cited By Plaintiff Do Not Support Her Argument.**

Plaintiff appears to assert that the Act controls because it was applied in McCartney v. Richfield Bank & Trust Co., 2001 WL 436154 (Minn. Ct. App., May 1, 2000). It is not clear how Plaintiff reached that conclusion because the Court in McCartney did not even mention, let alone analyze, the question of whether the Code or the Act applied.

Plaintiff also cites Appley v. West, 832 F.2d 1021 (7th Cir. 1987) and Chouteau Auto Mart, Inc. v. First National Bank of Missouri, 148 S.W.3d 17 (Mo. Ct. App. 2004) for the proposition that the Code and the Act do not conflict. These cases do not support the Plaintiff's argument.

First, Appley v. West, 832 F.2d 1021 (7th Cir. 1987) does not stand for the proposition cited. It does not even address the conflict between the Act and Code's statutes of limitation.

Second, in Chouteau Auto Mart, Inc. v. First National Bank of Missouri, 148 S.W.3d 17 (Mo. Ct. App. 2004) the plaintiff brought an action against the bank to recover

funds embezzled by an employee. 148 S.W.3d at 19-20. The court held that the Act controlled because the Code did not apply to the claims at issue. Id. at 21-22. Here, there is no dispute that both the Act and Code apply to Plaintiff's notice of breach of fiduciary duty claim. The issue is which statute controls.

II. THE DISTRICT COURT PROPERLY HELD THAT PLAINTIFF'S NOTICE OF BREACH OF FIDUCIARY CLAIM WAS TIME BARRED BY THE CODE'S STATUTE OF LIMITATION.

The District Court found that the "latest date that Plaintiff claims to have been made aware of Mr. Smith's breach of fiduciary duty is a date that Mr. Smith plead guilty to the federal charges, July 13, 2000." A. App. at 90. The District Court also found that the suit was not commenced until July 25, 2003.⁴ Id. Therefore, the Court concluded that "Plaintiff's claims are barred by the applicable three-year statute of limitation." Id.

Plaintiff does not challenge the consequences of the Code's application, nor could she. It is undisputed that the cause of action accrued no later than July 13, 2000, when Smith pled guilty. Therefore, if the Court of Appeals decides that the District Court was correct in applying the three-year statute of limitation, the Court need not engage in further analysis regarding the consequences of the application.

III. THE DISTRICT COURT CORRECTLY HELD THAT THE CODE DISPLACED PLAINTIFF'S COMMON LAW CLAIMS OF NEGLIGENCE AND BREACH OF CONTRACT.

The District Court held that the "Uniform Commercial Code indicates that common law remedies are available only if they are specifically referenced by the code or

⁴ The action was in fact commenced on July 31, 2000, which is the date First National acknowledged service pursuant to Minn. R. Civ. P. 4.05. A. App. at 7.

if they do not conflict with the provisions and remedies of the code.” A. App. at 91. The District Court held that “by incorporating into Minn. Stat. § 336.3-307 the standard of actual knowledge that the fiduciary was acting improperly, the legislature intended to replace the common law standard of negligence with one of actual knowledge.” Id. Therefore, the Court held that “Minn. Stat. § 336.3-307 displaces Plaintiff’s common law claims.” Id.

A. The Code Displaces Inconsistent Common Law Claims.

Article 3 of the Code sets forth a detailed structure for allocation of losses due to conversion of trust funds. See Minn. Stat. §§ 336.3-306 and 336.3-307. As such, Article 3 has displaced common law claims that conflict with its provisions and remedies. Halla v. Norwest Bank Minnesota, N.A., 601 N.W.2d 449, 451 (Minn. Ct. App. 1999) (Article 3 of the Code displaced common law claim of conversion); Siler v. Principal Financial Securities, Inc., 2000 WL 1809048 at *5 (Minn. Ct. App. Dec. 12, 2000) (Same) (Contained in Respondent’s Appendix at 202-208 in accordance with Minn. Stat. § 480A.08 (2004)); Amzee Corp. v. Comerica Bank-Midwest, 2002 WL 1012998 at * 9-10 (Ohio Ct. App. May 21, 2002) (citing Halla in support of holding that Article 3 of the Uniform Commercial Code displaced common law claims of conversion, negligence, and unjust enrichment) (Contained in Respondent’s Appendix at 209-220 in accordance with Minn. Stat. § 480A.08 (2004)); see also Taylor Investment Corporation v. Weil, 169 F.Supp.2d 1046, 1057 (D. Minn. 2001) (Article 2 of the Code has displaced common law claim of recession.); Hapka v. Paquin Farms, 458 N.W.2d 683, 688 (Minn. 1990) (Article 2 of the Code has displaced negligence and strict products liability.); Superwood

Corp. v. Siempelkemp Corp., 311 N.W.2d 159, 162 (Minn. 1981) (Same); Hedged Investment Partners v. Norwest Bank, MN, 578 N.W.2d 765, 770-71 (Minn. Ct. App. 1998) (discussing Code's intent to displace common law claims that are addressed by specific provisions of the Code).

B. Plaintiff's Common Law Claims Conflict With The Provisions And Remedies Of The Code.

Plaintiff's common law claims of negligence and breach of contract conflict with the Code. Code section 336.3-307 provides that a bank is liable only if it had actual knowledge of a breach of fiduciary duty. In contrast, the common law claims of negligence and breach of contract require a far less stringent showing to establish liability. Thus, the District Court correctly held that the Code displaced Plaintiff's common law claims of negligence and breach of contract.

C. Plaintiff's Argument Fails.

Plaintiff asserts that the Code does not "preempt" her common law claims of negligence or breach of contract because the Code only applies to a taker and not a payor bank. As demonstrated above, section 336.3-307 explicitly provides that it applies to a "payor bank" such as First National. See Minn. Stat. § 336.3-307 Comment 2.

IV. PLAINTIFF HAD THREE MEANINGFUL OPPORTUNITIES TO RESPOND TO FIRST NATIONAL'S ARGUMENT THAT PLAINTIFF'S NOTICE OF BREACH OF FIDUCIARY DUTY CLAIM WAS TIME BARRED.

Plaintiff asserts that the District Court's order should be "invalidated" on the ground that First National raised section 336.3-118(g) for the first time in its Reply Memorandum.⁵ Appellant's Brief at 12. This argument lacks a basis in law and fact.

A. Plaintiff Had A Meaningful Opportunity To Respond.

Minnesota law requires the District Court to provide a party a "meaningful opportunity" to respond. See, e.g., Hebrink v. Farm Bureau Life Ins. Co., 664 N.W.2d 414, 419 (Minn. Ct. App. 2003).

In its opening memorandum, First National argued that the Code applies to Plaintiff's notice of breach of fiduciary duty claim. In her memorandum in opposition, Plaintiff asserted that the Act applies. In its Reply Memorandum, First National noted that Plaintiff's claims are time barred pursuant to Code section 336.3-118(g).

Although First National raised the Code's statute of limitation in its Reply Memorandum, Plaintiff had three meaningful opportunities to respond. First, Plaintiff submitted a "Supplemental Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment" after the service of First National's Reply Memorandum. A. App. at 52-68. Second, the Court held a hearing on August 12, 2004 at which time

⁵ Plaintiff also asserts that the order for summary judgment should be reversed because First National allegedly failed to comply with Minn. Gen. R. Prac. 115.03(d) in that its summary judgment memorandum did not contain a statement of the issues, statement of documents comprising the record, and statement of undisputed facts. Plaintiff cites no authority for the proposition that such conduct constitutes a reversible error.

Plaintiff addressed the Code's application. R. App. at 160-64, 169-73, 179. Third, after the hearing, Plaintiff submitted a "Second Supplemental Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment" in which she addressed the application of section 336.3-118(g). A. App. at 69-77.

1. **Plaintiff Presented All Her Arguments To The District Court.**

Moreover, simply demonstrating that the objecting party did not have a meaningful opportunity to respond is not sufficient. The objecting party must also show that if she had a meaningful opportunity to respond, she would have presented additional arguments that may affect the outcome of the motion. Septran, Inc. v. Independent School Dist. No. 271, Bloomington, MN, 55 N.W.2d 915, 920 (Minn. Ct. App. 1997) ("Appellant presents no reason why, if respondent had moved for summary judgment under the same circumstances, the court would have denied respondent's motion."); see also In re Sendecky, No. 02-1683 at *3 (8th Cir. Jan. 6, 2003) (District Court did not err in rendering decision prior to time to submit reply brief because party "failed to demonstrate that it had any additional arguments that had not already been advanced . . .") (Contained in Respondent's Appendix at 195-201 in accordance with Minn. Stat. § 480A.08 (2004)).

In her appellate Brief, Plaintiff asserts that the Code's statute of limitation does not apply because (1) the Code did not repeal the Act, (2) the Code only applies to a taker, (3) McCartney v. Richfield Bank & Trust Co. applied the Act, and (4) the "persuasive" authorities show the Code and Act do not conflict. Appellant's Brief at 16-24. However, Plaintiff raised these identical arguments (as well as additional arguments) in her initial

opposition to First National's motion for summary judgment. There, Plaintiff argued that "[i]n adopting the UCC, the Legislature repealed parts of the Uniform Fiduciaries Act and left the balance intact." A. App. at 36. She contended that "McCartney . . . supports the proposition that the Uniform Fiduciaries Act remains applicable and has not been displaced by the UCC." Id. at 37. Plaintiff also asserted that "[t]he UCC provision relied on by Defendant applies to 'takers' of instruments" and not a payor bank. Id. Finally, she claimed that the "UCC provision is not in conflict with the Uniform Fiduciaries Act provisions." Id. at 38. Moreover, Plaintiff made these same arguments at the hearing. R. App. at 160-64, 169-73, 179. As a result, Plaintiff's argument must be rejected.

B. The Cases Cited by Plaintiff Do Not Support Her Argument.

Plaintiff cites Hebrink v. Farm Bureau Life Ins. Co., 664 N.W.2d 414 (Minn. Ct. App. 2003) and Rhee v. Golden Home Builders, Inc., 617 N.W.2d 618 (Minn. Ct. App. 2000) in support of her assertion that she did not have a meaningful opportunity to respond. These decisions are easily distinguished from the case at bar.

In Hebrink, the Court of Appeals reversed the District Court's summary judgment because (1) the respondent "filed the motion only seven days before the trial date," (2) the motion was "mis-captioned" as a motion in limine and not a motion for summary judgment, and (3) appellant "received no notice that the court would consider summary judgment." Hebrink, 664 N.W.2d at 419-20. In Rhee, the Court of Appeals overturned an order granting an oral motion to amend the answer. This ruling was based on the fact that the appellant had "no notice that [respondent] would make the motion and no opportunity to prepare a response" Rhee, 617 N.W.2d at 620.

CONCLUSION

For the foregoing reasons, First National respectfully requests that this Court affirm the District Court's grant of summary judgment.

Dated: July 11, 2005



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CERTIFICATION

I, Ryan T. Murphy, hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with monospaced font. The length of this brief is 5,475 words. This brief was prepared using Microsoft Word 2000.



Ryan T. Murphy

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).